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DATED : 14.03.2017

C O R A M

THE HON'BLE MR. JUSTICE M. DURAISWAMY

Second Appeal (MD) No.1272 of 2011 &
C.M.P.(MD) Nos.657 & 1053 of 2017

1.Ponraj
2.Israel Thangamsamy
3.Sundararaj ... Appellants/Appellants/Plaintiffs

v.

1.Paulsingh
2.Rathinavathi Ammal ... Respondents/Respondents/Defendants

Second Appeal filed under section 100 C.P.C. against the judgment and decree dated 30.08.2011 made in A.S.No.81 of 2010 on the file of Sub Judge, Ambasamudiram, confirming the Judgment and Decree dated 14.09.2010 made in O.S.No.224 of 2005 on the file of Principal District Munsif Court, Ambasamudiram.

For Appellant : Mr.T.S.R.Venkataramana

For Respondent : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

J U D G M E N T

The above second appeal arises against the judgment and decree passed in A.S.No.81 of 2010 on the file of Sub Court, Ambasamudiram confirming the judgment and decree passed in O.S.No.224 of 2005 on the file of Principal District Munsif Court, Ambasamudiram.

2. The plaintiffs are the appellants and the respondents are the defendants in the suit.



3. The plaintiff filed the suit in O.S.No.224 of 2005 for declaration and permanent injunction.

4. The brief case of the plaintiffs is as follows:-

(i) According to the plaintiffs, the suit lands in Ayanpunjai Survey No.842/1, measuring an extent of 11.32 acres and Ayanpunjai Survey No.843/1, measuring an extent of 4.89 acres, originally belonged to Nachiyarammal. On 15.06.1960, Mayava Nadar and Deva Evu Nadar, who is the father of the plaintiffs, jointly purchased an extent of 8.10 acres, i.e., undivided half share of 5.66 acres in S.F.No.842/1 and undivided half share of 2.44 acres in S.F. No.843/1, from Nachiyarammal. The remaining portion in the total extent of 8.10 acres was purchased by Devadasa Nadar from Nachiyarammal, through a sale deed dated 25.08.1960. He purchased an undivided extent of 5.66 acres in S.F.No.842/1 and undivided extent of 2.44 acres in S.F.No.843 /1.

(ii) According to the plaintiffs, Deva Evu Nadar, the plaintiffs' father, became owner of undivided 8.10 acres in S.F.Nos.842/1 and 843/1. After the demise of Deva Evu Nadar, there was an oral partition between the plaintiffs and thereafter, they sold 2.55 acres in S.F.No.842/1 and also sold the entire extent of 4.85 acres in S.F.No.843/1 in favour of David Gnana Singam. The plaintiffs claimed exclusive right, title and enjoyment over the cart track in the land measuring an extent of 66 cents, which was withheld by the plaintiffs in S.F.No.842/1.

(iii) According to the plaintiffs, the defendants have no right or title over the suit property. Further, according to the plaintiffs, the adjoining land belong to Pasupathi Udayabalan and Asir Udayabalan, who are the legal heirs of late Devadasa Nadar. The plaintiffs also pleaded that except the suit track, no other way is available to reach S.F.No.848 in the suit cart track. In these circumstances, the plaintiffs have filed the suit for declaration and permanent injunction.

5. The brief case of the defendants is as follows:

(i) According to the defendants, late Devadasa Nadar is the father's brother of the first defendant. Therefore, as an elder brother of the family, the properties were purchased in his name. Subsequently, there was an arrangement between Devadasa Nadar and the first defendant, by which, the first defendant was allotted with 3.14 acres in S.F.No.842/1-R and an extent of 40 cents in S.F.No.842/1-S.

(ii) According to the defendants, there is no cart track as described in the suit schedule. Further, the defendants denied the sale made in favour of David Gnana Singam. The defendants have also disputed the withholding of the land by the plaintiffs



measuring an extent of 66 cents in S.F.No.842/1.

(iii) According to the defendants, the first defendant executed a settlement deed in favour of his wife, the second defendant on 08.05.2002. Further, the defendants contended that the plaintiffs, have no right or title or enjoyment over the suit property. In these circumstances, the defendant prayed for dismissal of the application.

6. Before the Trial Court, on the side of the plaintiffs, 2 witnesses were examined and 11 documents Exs.A.1 to Ex.A.11 were marked and on the side of the defendants, 2 witnesses were examined and 11 documents Ex.B.1 to Ex.B.11 were marked. The Advocate Commissioner's report and plans were marked as Exs. C1 to C3.

7. The Trial Court, after taking into consideration the oral and documentary evidences of both sides, dismissed the suit.

8. Aggrieved over the judgment and decree of the Trial Court, the plaintiffs preferred an appeal in A.S.No. 81 of 2010 and the Lower Appellate Court also confirmed the judgment and decree of the Trial Court and dismissed the appeal.

9. Aggrieved over the judgment and decree of the courts below, the plaintiffs have filed the above Second Appeal.

10. Heard Mr.T.S.R.Venkataramana, learned counsel appearing for the appellants and Mr.V.Meenakshi Sundaram, learned counsel appearing for the respondents.

11. The appellants have raised the following substantial questions of law in the above second appeal:-

"(i) When appellants/plaintiffs ownership of Ac. 8.10 is proved by Exs.A1, A3, A4 and A5, the paramount title deeds, can the right of Appellants/plaintiffs over the suit cart track in S.No.842/1 be rejected for want of patta?

(ii) When 1993(3) CTC 304 categorically asserts that Revenue Records cannot create or extinguish title can Respondents/Defendants claim right to an excess of 66 cents contrary to his prior sale deed Ex.A2?

(iii) When 1993(3) CTC 650 reiterates the Law that Patta is not the title can Appellants /Defendants be non-suited on the basis of Pattas in Exs.A1, A8 and B6?

(iv) Can the non-mention of the cart track in Revenue Records defeat the rights of the Appellants/Plaintiffs



contrary to Sec.9(2) of the Tamil Nadu Survey and Boundaries Act and against the decision of this Hon'ble Court in 2006(1) MLJ 426?"

12. Mr.T.S.R.Venkataramana, learned counsel appearing for the appellants submitted that taking advantage of the omission of the plaintiffs' name in Ex.B6 patta, the defendants claim an excess extent of 66 cents. Further, the learned counsel submitted that ignoring Ex.A2 sale deed, the defendants claimed right over an extent of 8.76 acres, whereas, they are entitled only to an extent of 8.10 acres. Further, the learned counsel submitted the defendants were given wrong pattas under Exs. A11, A8 and B6 for a total extent of 8.76 acres, contrary to the extent mentioned in Ex.A2. The learned counsel also submitted that patta produced by the defendants is not a document of title and the same shall not confer title on the defendants. The learned counsel further submitted that the courts below have erroneously dismissed the suit. In support of his contention, the learned counsel relied upon the following judgments:-

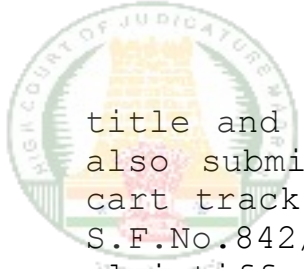
(i) **AIR 1997 Supreme court 2181 (State of Himachal Pradesh v. Keshav Ram and others)** wherein the Apex Court held that entry in the revenue records cannot form basis for declaration of title.

(ii) **2000 - 1 L.W.154 (The Government of Tamil Nadu, by its Collector of Ramanathapuram at Madurai and others v. Peria Pallivasal, Abiramam, by its Trustee and another)** wherein this Court held that mere classification of particular land in revenue record is not by itself conclusive.

(iii) **1999 (III) CTC 650 (Guruvammal and another v. Subbiah Naicker and others)** wherein this Court held that when no instrument evidencing partition was filed, order of transfer of patta alone would not establish partition and also held that patta is not a document of title.

(iv) **1999 (III) CTC 304 (Kammavar Sangam through its Secretary R.Krishnasamy v. Mani Janagarajan)** wherein this Court held that when the plaintiff did not produce any document to prove antecedent title of his grand-father, reliance on patta cannot be made to prove title as patta, which mutates, entries cannot convey or extinguish right over property.

13. Countering the submissions made by the learned counsel appearing for the appellants, Mr.V.Meenakshi Sundaram, learned counsel appearing for the respondents submitted that the courts below have concurrently and rightly dismissed the suit filed by the appellants for the reason that they failed to establish their case by oral and documentary evidences. The learned counsel further submitted that the plaintiffs failed to prove exclusive



title and possession over the suit property. The learned counsel also submitted that the plaintiffs were not able to prove the cart track forms part and parcel of 66 cents withheld by them in S.F.No.842/1. The learned counsel also submitted that the plaintiffs should succeed on the strength of their case and not on the weakness of the defendants. In these circumstances, the learned counsel prayed for dismissal of the Second Appeal. In support of his contention, the learned counsel for the respondents relied upon the following judgments:-

(i) **AIR 2003 SUPREME COURT 1989 (Banarsi and others v. Ram Phal)** wherein, the Hon'ble Supreme Court held as follows:-

"9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and Anr., [1971] 1 SCR 146 that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and need not neither prefer an appeal nor take any cross objection though certain finding may be against him.



Appeal and cross-objection - both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was well-settled position of law under the unamended CPC.

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10. CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent."

(ii) **AIR 2006 SC 1975 (Gurdev Kaur & Ors. v. Kaki & Ors)** wherein, the Hon'ble Supreme Court held as follows:-

"67. Rationale behind permitting second appeal on question of law The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have



authority to make binding decisions on question of law.

68. The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference under Section 100, C.P.C. by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

69. Now, after 1976 Amendment, the scope of Section 100 been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

- (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;
- (ii) The substantial question of law to precisely state such question;
- (iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;
- (iv) Another part of the Section is that the appeal shall be heard only on that question.

(iii) **1996(1) MLJ 426 (Vemba Gounder v. Pooncholai Gounder)**
wherein, this Court held as follows:-



"29. In this case, admittedly, there is no finding whether the report filed by the Commissioner can be accepted or not, i.e., there is no finding by the Court below about the satisfactory procedure adopted by the Commissioner in filing the report and also about the correctness of the report. So long as there is no finding, the jurisdiction of the Court in appointing a second Commissioner as sought for by the petitioner is doubtful. The dismissal of the application by the Court below cannot, therefore, be interfered with."

(iv) **2015(3) MWN (Civil) 522 (A.Saraswathy v. Thangamuthu and others)** wherein, this Court held as follows:-

"16. In fact, the learned Lower Appellate Judge has not chosen to consider the above said aspect and the finding of the trial court in this regard was not disturbed by the Lower Appellate Court. According to the contention raised on behalf of the appellant, the said finding of the trial court shall be deemed to have been accepted and confirmed by the Lower Appellate Court. Of course, no cross objection has been taken by the contesting respondents. However, the learned counsel for the contesting respondents contend that in case this Court may take the absence of discussion by the Lower Appellate Court regarding the contention of the contesting defendants that the suit property was acquired using the joint family nucleus for confirming the finding of the trial court, since decree of the Lower Appellate court is in favour of the contesting respondents / defendants 2 to 7, they can very well contend that the said finding rendered against them is wrong and that the said issue should have been decided in favour of the contesting respondents for supporting the decree passed by the Lower Appellate Court. Moreover, when a finding on an issue has not been made the basis of the decree, the person against whom such finding has been rendered, cannot file an appeal and even present a cross objection, because an appeal can be filed or cross objection can be taken only against the decree or part of the decree and not against the finding which has not been made the basis of the decree.

17. Order 41 Rule 2 of the Civil Procedure Code reads as follows:-

<https://hcservices.ecourts.gov.in/hcservices/>

Grounds which may be taken in Appeal.- The appellant shall not, except by leave of the Court, urge or be



heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

The explanation is to the effect that if the respondent in the Appeal is aggrieved by a finding of the Court in the judgment on which the decree appealed against is based, he/she may file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding the fact that by reason of the decision of the Court on any other issue which is sufficient for the decision of the suit, the decree, is wholly or in part in favour of the respondent. The main part of sub-section (1) states that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but also contend that a finding against him in the court below in respect of any issue ought to have been in his favour. It further proceeds to state he may also take any cross objection to the decree. If the contents of the said provision is applied in stricto-sensu, it can be said without hesitation that no appeal or cross objection will lie against a finding on which the decree appealed against is not based and that on the other hand such finding can be contended to be erroneous by the respondent in an appeal, while supporting the decree in his favour which is challenged in the appeal. Hence there cannot be any valid objection for allowing the contesting respondents from contending that the finding of the Trial Court, which was not disturbed by the Lower Appellate Court, is erroneous and the finding should have been given in favour of the respondents."

14. On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and the judgments relied upon by the learned counsel on either side, it could be seen that the plaintiffs' father, viz., Deva Evu Nadar, was entitled to 8.10 acres in Survey Nos. 842/1 and 843/1. The remaining extent of 8.10 acres belonged to one Devadasa Nadar. Further, it was contended that Deva Evu Nada

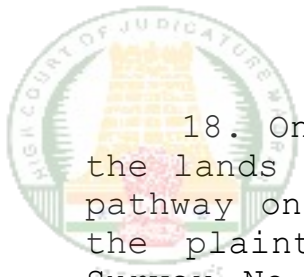


partitioned an extent of 8.10 acres with Devadasa Nadar and he was allotted 3.21 acres in Survey No.842/1 and an extent of 4.89 acres in Survey No.843/1. The plaintiffs contended that the defendants are not entitled to any share in the said survey numbers. The defendants contended that they are the brothers' son of Devadasa Nadar and that the purchase made by the Devadasa Nadar was for his benefit. Further, the defendants contended that the suit property is the joint family property and the first defendant is entitled to a share in the property. In order to prove the case of the plaintiffs, they produced Exs.A1 to A5 sale deeds. D.W.2 is the son of Devadasa Nadar. All the sons of Devadasa Nadar executed a consent letter marked as Ex.B5, whereby, the first defendant is entitled to an extent of 3.54 acres in Survey No.842/1. The plaintiffs filed the suit on 23.08.2005. It is settled position that the burden of proof lies on the plaintiffs and that the plaintiffs should succeed in their case by the strength of their case and not on the weakness of the defendants.

15. It is the case of the plaintiffs that their father was allotted an extent of 4.89 acres in Survey No.843/1 and an extent of 3.21 acres in Survey No.842/1, which is shown as first schedule. When the plaintiffs contended that they are having 66 cents in Survey No.842/1, they should have produced necessary evidence to establish the said contention. However, the plaintiffs have not shown any evidence to support this contention. Except the evidence of P.W.1, there is no evidence to establish the case of the plaintiffs.

16. It is also pertinent to note that Survey No.842/1 was already subdivided into number of subdivisions, which is evident from Exs.B1, B10 and B11. On a perusal of the evidence of P.Ws, it is clear that they were not clear about the survey number in which their remaining lands situate. The plaintiffs contended that remaining extent of 66 cents situate in two places. One on the eastern side of 8.10 acres of land belonging to the Devadasa Nadar, which is the suit cart track and another portion on the south of the property sold to David Gnana Singam and north of Devadasa Nadar's land. The plaintiffs failed to produce any independent evidence to prove their case.

17. Exs.A12 and A13 were marked as additional documents before the Lower Appellate Court. Ex.A12 is the certified copy of the sale deed executed by Ponraj and others in favour of David Gnana Singam and Ex.A13 is the certified copy of the Observation Mahazar. The plaintiffs' side witnesses did not say that the plaintiffs are enjoying some extent of land in Survey No.842/1. P.W.2 has clearly stated that the plaintiffs' father was allotted a portion and Devadasa Nadar was allotted the remaining portion.



18. On a perusal of Ex.B1, it is clear that Survey No.843 and the lands sold by the plaintiffs are situated in one block. The pathway on the northern side was also allotted to the share of the plaintiffs' father. This pathway was also subdivided as Survey No.842/1C. Further, joint patta was also given in the name of Devadasa Nadar and the plaintiffs. Ex.A8, joint patta, also do not support the case of the plaintiffs. On the other hand, the defendants were given patta in respect of Survey No.842/1S. P.W.2 deposed that 30 cents had been allotted as pathway on the southern side, which is contrary to the plaintiffs' case. According to the plaintiffs, their predecessors were allotted a share on the eastern side of the Survey No.842/1. Though the plaintiffs contended that their predecessors-in-title were using the cart track for more than 100 years, they failed to establish the said contention by any oral and documentary evidences. The Commissioner's report also did not support the case of the plaintiffs. As per the Commissioner's report, the description of the property is also not correct. Though the Advocate Commissioner has given a report and the respondents have filed their objections, the courts below ought to have considered the objections filed by the respondents before coming to the conclusion as to the existence of the cart track. In the absence of any evidence produced by the plaintiffs to prove the existence of the suit cart track in their lands, the case of the plaintiffs cannot be accepted.

19.1 The appellants filed a Miscellaneous Petition in C.M.P.No.657 of 2017 under Order 41, Rule 27 of CPC to receive the sale deed dated 16.07.2003 executed by Ponraj and two others in favour of David Gnana Singam.

19.2 In the affidavit filed in support of the petition, the appellants have stated that in the Second Appeal, it was argued by the respondents that the appellants have not produced the said document to show that they sold an extent of 7.40 acres to David Gnana Singam on 16.07.2013. Therefore, in order to disprove the submission made by the respondents, the present Miscellaneous Petition has been filed.

19.3 The respondents filed their counter stating that the document sought to be marked as additional document was not produced before the courts below and the appellants have not given any reason for not producing the same, before the courts below. Hence, the Miscellaneous Petition is liable to be rejected.

19.4 Though the appellants filed an application under Order 41, Rule 27 of CPC before the Lower Appellate Court also for marking Exs.A12 and A13, they choose not to mark the sale deed dated 16.07.2003, as additional document, before the Lower Appellate Court. The appellants cannot mark additional documents in a peace meal manner without giving any acceptable reason. The appellants have not given any acceptable reason for not producing



the sale deed before the courts below. In the absence of sufficient reason given by the appellants for not producing the said petition before the courts below, the present petition is liable to be rejected. Consequently, Miscellaneous Petition in C.M.P.No.1053 of 2017, which was filed by the appellants, to substitute the xerox copy of the sale deed dated 16.07.2003 with the certified copy, is also liable to be rejected.

20. Though there is no dispute with regard to the ratios laid down in the judgments relied upon by the learned counsel for the appellants, since the facts and circumstances of the present case are different, the said judgments are not applicable to the case on hand.

21. The plaintiffs also failed to prove the alleged oral partition between them. Since the appellants/plaintiffs have failed to establish their case by adducing proper evidence, the courts below have rightly dismissed the suit.

22. In these circumstances, I do not find any ground much less any substantial question of law to interfere with the concurrent findings of the courts below. The Second Appeal is liable to be dismissed. Accordingly, the Second Appeal is dismissed. No costs. C.M.P.Nos.657 of 2017 and 1053 of 2017 are also dismissed.

Sd/-

Assistant Registrar(CS-III)

/True copy/

Sub Assistant Registrar

To

1.The Subordinate Judge,
Ambasamudiram.

2.The Principal District Munsif,
Ambasamudiram.

+1 cc to Mr.T.S.R.Venkatatraman , Advocate in SR.No. 14372
+1 cc to Mr.D.Nallathambi , Advocate in SR.No. 14812

Rj

AE/JC/SAR4/05.04.2017/12P/5C

Judgment in
Second Appeal (MD) No.1272 of 2011 &
C.M.P. (MD) Nos.657 & 1053 of 2017

14.03.2017